

WC 08-8

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of:

Petition of the Embarq Local Operating
Companies for Limited Forbearance
Under 47 U.S.C. § 160(c) from
Enforcement of Rule 69.5(a), 47 U.S.C.
§ 251(b), and Commission Orders on the
ESP Exemption

WC Docket No. 08-_____

PETITION FOR FORBEARANCE

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TABLE OF CONTENTS

SUMMARY	iii
I. INTRODUCTION	1
II. THE COMMISSION SHOULD FORBEAR FROM ENFORCING THE ESP EXEMPTION FOR IP-ENABLED VOICE CALLS TERMINATED TO THE PSTN.	6
A. Under Existing Law, IP-to-PSTN Voice Calls Are Subject to Access Charges.	6
1. The Commission's Access Charge Rules Govern All Voice Traffic Connected to the PSTN.	6
2. The ESP Exemption Does Not Extend to IP-to-PSTN Voice Traffic.	8
3. Interconnected VoIP Is Functionally No Different Than More Traditional Voice Services Supported by the PSTN.	10
B. Providers Are Over-Extending Claims to the ESP Exemption, Which is Creating Too Many Disputes and Threatening Needed Investment in Local Networks.	12
C. The Commission Should Use its Forbearance Authority to Ensure the ESP Exemption Is Not Misapplied to the Detriment of Consumers and Competition.	14
D. Limited Forbearance Should Extend to Commission Orders Creating and Acknowledging the ESP Exemption, to 47 C.F.R. § 69.5(a), and to 47 U.S.C. § 251(b)(5).	17
III. FORBEARANCE STANDARDS ARE MET.	18
A. The ESP Exemption Is Not Necessary to Ensure Just and Reasonable and Nondiscriminatory Charges on IP-to-PSTN Voice Traffic.	18
B. The ESP Exemption Is Not Necessary to Protect Consumers.	21

C.	Forbearance from the ESP Exemption on any IP-to-PSTN Voice Traffic Is in the Public Interest.	23
1.	Forbearance Would Promote and Enhance Competition.	23
2.	Forbearance Would Reduce Regulatory Arbitrage and Disputes.	26
3.	Forbearance Would Protect Investment in the PSTN, Particularly in Rural America.	28
IV.	CONCLUSION	29
APPENDIX A:	Embarq Local Operating Companies	31

SUMMARY

The Embarq Local Operating Companies (“Embarq”)¹ face a growing number of disputes about the appropriate compensation for terminating non-local calls routed to the public switched telephone network (“PSTN”) that originated in Internet Protocol (“IP”). Increasingly, some carriers are claiming that their IP-to-PSTN voice calls are exempt from access charges because of a regulation that the Commission created in the 1980s for enhanced service providers (“ESPs”). These carriers are claiming preferential treatment for IP-to-PSTN traffic by pretending that the ESP exemption prohibits local exchange carriers (“LECs”) like Embarq from recovery ordinary compensation for terminating calls on the PSTN, simply because those calls originated with a service provider that uses IP technology.

By this petition, Embarq asks the Commission to forbear from any application of the ESP exemption to IP-to-PSTN voice traffic. Embarq believes it should be clear that the ESP exemption has never properly applied to IP-to-PSTN voice calls. The regulation was created to exempt the links between ESPs and their subscribers – for example, links between Westlaw and its early subscriber terminals and dial-up connections from a subscriber to an Internet service provider (“ISP”). It has never applied, and cannot be fairly extended to apply, to voice calls to *nonsubscriber* third parties on the PSTN. The exemption, moreover, applies only to ESPs. It has never applied to telecommunications carriers. Embarq does not receive these voice calls from ESPs, but from carriers that deliver ordinary voice calls for termination on the PSTN. When they are delivered by

¹ The Embarq Local Operating Companies are listed in Appendix A.

those carriers to Embarq, they have already been converted into ordinary voice calls, using the same technology format as any traditional voice calls.

Nevertheless, IP-based voice service providers and their associated carriers have become very aggressive in attempting to stretch the ESP exemption. These attempts to use regulatory arbitrage to avoid the access charge rules for non-local calls create needless disputes and pose serious problems for the nation. The Commission should use its forbearance authority to stop such misapplication of the ESP exemption, for several reasons.

First, forbearance will ensure that the ESP exemption is not to be used to give an artificial competitive advantage to one group of service provider. The ESP exemption was intended to promote the growth of the early ESP industry, but it never gave any particular provider a regulatory advantage. In contrast, extending the ESP exemption to IP-originated voice calls would give a grossly unfair advantage to one class of voice service providers, just because they use IP-technology in originating voice calls.

The communications industry is rapidly moving from circuit-switched to IP-based technologies. Embarq also is increasingly embracing IP technology in its own network and services. Many have argued that traditional telecommunications rules should not apply to the Internet, and Embarq generally agrees with this proposition. There is, however, no reason to grant regulatory advantages to the use of IP that terminates on the PSTN. Artificial distinctions based on technology always should be avoided, and IP-based providers can and do compete quite effectively without their IP-to-PSTN calls free-riding on the PSTN. Forbearance will ensure a level competitive playing field between

interconnected voice over Internet protocol (“VoIP”) and traditional voice services when they use the PSTN in the very same way.

Second, forbearance will maintain needed support for the PSTN. The PSTN provided by LECs like Embarq is the network on which the vast majority of the nation’s traffic will long depend. Regardless of technology, the Commission’s intercarrier compensation system remains vital to the health of the PSTN. It helps ensure that all users of the PSTN provide support for the very real costs of maintaining and upgrading that expensive network.

Without that support, investment in the PSTN will only be short-changed, especially in rural, high-cost environments that most need infrastructure and broadband investment. Rural ILECs like Embarq are particularly reliant on access revenues to support their carrier-of-last-resort (“COLR”) obligations. In its service areas, Embarq is the only entity that is obligated to provide service to virtually anyone on request, and at averaged rates often far below actual costs. The access charges applied to non-local calls are part a critical part of COLR support. Forbearance will protect investment in the PSTN and promote the extension of advanced telecommunications capability to rural areas where such investment otherwise will become increasingly difficult to justify.

Third, the Commission has open proceedings on intercarrier compensation and universal service reform. Embarq supports those efforts. Reform, however, must be done comprehensively. It would be arbitrary and unreasonable to allow some carriers to claim a regulatory exemption based on just one aspect (access charges) of the complex and interrelated rules governing how the PSTN is supported. Until the Commission completes intercarrier compensation and universal service reform, it should take steps to

protect the integrity of the existing regime. Embarq believes it is self-evident that IP-to-PSTN access traffic does not fall within the narrow scope of the ESP exemption. The Commission can and should reduce regulatory arbitrage, minimize disputes, and protect and promote competition by forbearing from any application of the ESP exemption whenever it is claimed to treat IP-originated voice calls differently from any other calls that terminate on the PSTN.

Accordingly, Embarq's Petition meets section 10's standards for forbearance.² Section 10(a)(1) is met, because enforcing the ESP exemption, to the extent it may be claimed to apply to IP-originated phone-to-phone voice traffic that terminates on the PSTN, is not necessary to ensure that charges or practices are just and reasonable, and not unjustly or unreasonably discriminatory. On the contrary, forbearance will ensure that *all* phone-to-phone calls are subject to the same access charges – instead of discriminating in favor of one class of service provider or consumer. Section 10(a)(2) is met, because enforcement is not necessary to protect consumers. Instead, forbearance will benefit consumers by ensuring that IP-enabled voice calls contribute their fair share of the costs of the PSTN, and so ensuring that non-VoIP consumers are not forced to pay higher costs. Section 10(a)(3) is satisfied, because forbearance is in the public interest. It will protect and promote competition by ensuring the same rules apply to all service providers, and it will preserve support that is critical for the PSTN and for the deployment of advanced telecommunications infrastructure, particularly in rural America.

² 47 U.S.C. § 160.

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ESP Exemption)	

PETITION FOR FORBEARANCE

Pursuant to 47 U.S.C. § 160(c) and 47 C.F.R. § 1.53, Embarq respectfully requests that the Commission exercise its statutory authority to forbear from any application or enforcement of the ESP exemption to IP-to-PSTN voice traffic. Some companies providing IP-originated voice services or carrying such traffic are wrongly claiming the ESP exemption. They are failing to contribute an equal share toward to the costs of the PSTN, even while interconnected VoIP and traditional voice service use the PSTN in the very same way. This regulatory arbitrage creates serious problems that make forbearance both appropriate and necessary.

I. INTRODUCTION

The ESP exemption is a regulation created by Commission orders, an outgrowth in the comprehensive access charge plan it adopted in 1983.³ The access charge system was designed to allow LECs to recover the costs associated with the origination and

³ *MTS and WATS Market Structure*, Memorandum Opinion and Order, 97 FCC 2d 682 (1983) (subsequent history omitted) (“*Access Charge Order*”).

termination of calls on their carrier-of-last-resort networks. LECs were then, and still are, required to look to other carriers for compensation to help cover the high costs of fulfilling government mandates to build local networks ubiquitously and provide service at averaged, affordable rates.

When it established this system, the Commission intended “to apply these carrier’s carrier charges to interexchange carriers, and to all resellers *and enhanced service providers*.”⁴ ESPs, however, were granted a “temporary exemption” from access charges to protect them from the “shock” of access costs during the entire industry’s transition to the new access system.⁵ The exemption allowed ESPs to be treated as “end users” for purposes of applying access charges.⁶ In 1987, the Commission issued an NPRM to examine whether ESPs should commence paying access charges.⁷ The following year, it decided to retain the ESP exemption indefinitely, but declined to make it “permanent.”⁸ While the Commission noted its “concern that the charges currently paid by enhanced service providers may not contribute sufficiently to the costs of the exchange access facilities they use in offering their services to the public,” it nevertheless

⁴ *Id.* at ¶ 76 (emphasis added). The meaning of “ESP” is narrower than Internet service provider (“ISP”). For the purposes of Embarq’s petition, there no need to distinguish between the two.

⁵ *Id.* at ¶ 83.

⁶ “End user” was defined in the Commission’s rules as “any customer of an interstate or foreign telecommunications service that is not a carrier....” 47 C.F.R. § 69.2(m). IP-originated voice calls terminated on the PSTN are routed to a LEC by interconnecting carriers, which are responsible for the charges for their use of the PSTN.

⁷ *Amendment of Part 69 of the Commission’s Rules Relating to Enhanced Service Providers*, Notice of Proposed Rulemaking, 2 FCC Rcd 4305 (1987) (“*ESP NPRM*”).

⁸ *Amendments of Part 69 of the Commission’s Rules Relating to Enhanced Service Providers*, Order, 3 FCC Rcd 2631 at ¶¶ 2, 18 n.51 (1988) (“*ESP Order*”).

found extraordinary “regulatory and judicial events” justified giving the nascent “enhanced service industry” temporary financial favor and protection from BOCs competition, even if at the expense of “other users of exchange access.”⁹

A decade later, the Commission decided to retain the exemption for enhanced service providers. It explained that the exemption was based on the recognition that ESPs do not use the PSTN the same way as other carriers, even though they rely on the “incumbent LEC networks to receive calls from their customers.”¹⁰ The Commission thus declined to treat ESPs like carriers, because they do not use the PSTN like carriers. Early ESPs included Westlaw dedicated research terminals and automated teller machines, later followed by dial-up Internet service providers. The Commission recognized that their traffic is more like that of end-user business customers.¹¹ That makes sense, because the ESP exemption covered only the connection between the ESP *and its subscribers*, not between the ESP and *its non-subscribers*.

Those justifications have never applied to IP-to-PSTN traffic, however. It would entirely inconsistent with the history of the exemption for it to apply to such calls. Indeed, when the Commission fashioned the exemption, it never intended it to cover any voice calls. Moreover, most of the entities that seek to avoid access charges through this

⁹ *Id.* at ¶ 1. Open Network Architecture Plans required in the *Computer III* proceeding had not yet been implemented, and the District Court overseeing the Bell System divestiture had modified the Modification of Final Judgment to allow the Bell Operating Companies (“BOCs”) to enter the information service provider market.

¹⁰ *Access Charge Reform*, First Report and Order, 12 FCC Rcd 15982 at ¶ 343 (1997), *pet. for rev. denied*, *Southwestern Bell Tel. Co. v. FCC*, 153 F.3d 523 (8th Cir. 1998) (“*Access Charge Reform Order*”).

¹¹ *Id.* at ¶ 345.

misapplication of the ESP exemption are not ESPs. They are *telecommunications carriers* that serve as the connection between VoIP providers and terminating LECs. The ESP exemption plainly has never applied to *them*. Moreover, when those interconnecting carriers route an IP-originated call to Embarq for termination on the PSTN, it is no longer in IP technology. It has already been converted into TDM format, the transmission form used by all other voice calls on the PSTN.

Nevertheless, a growing number of interconnected VoIP providers, and interconnecting carriers, are stretching the ESP exemption to cover traditional voice traffic. This phone-to-phone traffic consists of real-time voice calls originating on IP-based systems and terminating on the PSTN. To end users, the interconnected VoIP services from which this traffic originates are direct substitutes for traditional voice service. Moreover, the IP-to-PSTN traffic uses local telecommunications networks in the same way as traditional voice traffic, and it is largely indistinguishable from traditional voice traffic.

Admittedly, there has been and continues to be much debate and litigation about the regulatory status of VoIP traffic generally, with some claiming that interconnected VoIP qualifies as an “information service,”¹² and that this is true for all applications of VoIP technology. Embarq’s petition here is not part of that debate. It does not prejudice or limit Commission action in the *IP Enabled Services* proceeding.¹³ In determining

¹² In light of the growth of local telecommunications competition, Embarq has advocated a lighter regulatory touch on new services and deregulating traditional ILEC services wherever possible.

¹³ See *IP Enabled Services*, Notice of Proposed Rulemaking, 19 FCC Rcd 4863 (2004) (“*IP Enabled Services NPRM*”).

whether to grant this petition, the Commission need not address or determine whether VoIP services are information services. Nor does Embarq's petition impact any debate about the relative merits of IP-based technologies.

As explained below, however, use of IP technology does not render IP-to-PSTN voice calls "enhanced services." Even if one assumed they were, such calls still would not fall within the ESP exemption.¹⁴ Calls originating as interconnected VoIP use the PSTN no differently than any other voice traffic terminated on the PSTN.¹⁵ Carriers routing interconnected non-local VoIP calls to LECs for termination on the PSTN have always been subject to access charges. For the same reason, non-local IP-to-PSTN traffic cannot lawfully be routed through local interconnection trunks for purposes of reciprocal compensation under section 251(b)(5) of the Act.¹⁶ Nonetheless, some interconnected VoIP providers and their carrier partners are doing so in an attempt to justify refusing or threatening to refuse to pay access charges. Such regulatory arbitrage is harming competition and undermining the public interest.

The Commission can resolve these problems by forbearing from any application or enforcement of the ESP exemption to the extent it may be claimed to apply to IP-to-

¹⁴ Enhanced services are a subset of information services. *E.g.*, *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Comms. Act of 1934*, First Report and Order and Further Notice of Proposed Rulemaking, 13 FCC Rcd 11230 at ¶ 103 (1996).

¹⁵ Access charges are assessed on interexchange carriers and competitive local exchange carriers under 47 C.F.R. § 69.5(b).

¹⁶ 47 U.S.C. § 251(b)(5).

PSTN voice traffic.¹⁷ Forbearance would resolve the growing problem of access evasion by carriers of IP-to-PSTN voice traffic, and would reduce the disputes and problems that regulatory arbitrage engenders. It would maintain support for the PSTN on which IP and traditional traffic all depends. And it would promote critical investment in existing and new facilities, helping bring voice and broadband services to all Americans, particularly in rural areas that are most in need of infrastructure investment.

II. THE COMMISSION SHOULD FORBEAR FROM ENFORCING THE ESP EXEMPTION FOR IP-ENABLED VOICE CALLS TERMINATED TO THE PSTN.

A. Under Existing Law, IP-to-PSTN Voice Calls Are Subject to Access Charges.

1. The Commission's Access Charge Rules Govern All Voice Traffic Connected to the PSTN.

The Commission created the access charge system so that LECs could “recover the costs” associated with originating and terminating non-local telecommunications traffic for other service providers.¹⁸ LECs were then, and still are, required to look to other carriers for compensation to help cover the high costs of fulfilling government mandates to build local networks ubiquitously and provide service at averaged, affordable rates. Under Commission regulations, LECs collect access charges whenever non-local

¹⁷ Embarq files this petition pursuant to section 10 of the Telecommunications Act of 1996 and section 1.53 of the Commission's rules. 47 U.S.C. § 160(c); 47 C.F.R. § 1.53.

¹⁸ *Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers; Low-Volume Long-Distance Users; Federal-State Joint Board on Universal Service*, Sixth Report and Order in CC Docket Nos. 96-262 and 94-1, Report and Order in CC Docket No. 99-249, Eleventh Report and Order in CC Docket No. 96-45, 15 FCC Rcd 12962 at ¶ 130 (2000) (“CALLS Order”).

traffic uses the PSTN. As a general matter, access charges apply to *all* non-local traffic.

The ESP exemption is a narrow *exception* to the access rule.

Access charges were always meant to be broadly applied, and for good reason. They are critical for ILECs to recover the full costs of providing ubiquitous local networks as required by carrier-of-last-resort mandates – rules that make ILECs the only telecommunications carriers that must build network where it is uneconomical to do so. Carriers serving rural areas, like Embarq, are particularly dependent on access charges for revenue critical to maintain and invest in their networks. Without such networks, and without continued investment in them, services and capabilities for consumers would progressively degrade. Congress has reiterated its continued commitment to voice service nationwide, and it has directed the Commission to promote network investment to further deploy broadband services in low density, high-cost service territories where consumer need is most acute.¹⁹

The Commission disfavors rules that would discriminate in favor of one technology over another, when both use the PSTN the same way. In the long-pending *IP Enabled Services* proceeding, the Commission reiterated that “any service provider that sends traffic to the PSTN should be subject to similar compensation obligations, irrespective of whether the traffic originates on the PSTN, on an IP network, or on a cable network.”²⁰ It is entirely appropriate, the Commission explained, that the “cost of the PSTN should be borne equitably among those that use it in similar ways.”²¹ The

¹⁹ 47 U.S.C. 157 nt.

²⁰ *IP Enabled Services NPRM* at ¶ 61.

²¹ *Id.*

Commission should forbear from any extension of the ESP exemption to IP-to-PSTN traffic, because such an extension would violate the principle of competitive neutrality.

2. The ESP Exemption Does Not and Should Not Extend to IP-to-PSTN Voice Traffic.

The Commission has explained that the ESP exemption was created because ESPs do not use the PSTN the same way as other carriers. ESPs should not be treated the same as carriers “solely because [they] use incumbent LEC networks to receive calls from their customers.”²² In the late 1990s, after fifteen years of dramatic “evolution in ISP technologies and markets since we first established access charges,” the Commission again decided to retain the exemption. It declined to treat ESPs like carriers, because, in the Commission’s words, they do not “use the public switched network in a manner analogous to IXCs.” Instead, “characteristics of ISP traffic (such as large numbers of incoming calls to Internet service providers)” make them more like “other classes of business customers.”²³

In upholding the Commission’s order, the Eighth Circuit highlighted the cornerstone of the exemption. ESPs “do not utilize LEC services and facilities in the same way or for the same purposes as other customers who are assessed per-minute interstate access charges.”²⁴ While two types of service providers “use the LEC network services and facilities that might be ‘technologically identical,’” the exemption was not

²² *Access Charge Reform Order*, 12 FCC Rcd 15982 at ¶ 343.

²³ *Id.* at ¶ 345.

²⁴ *Southwestern Bell Tel. Co. v. FCC*, 153 F.3d 523, 542 (8th Cir. 1998).

unreasonably discriminatory. “[T]he services and facilities provided by the LEC are ‘distinct’ if the carriers are making different uses of them.”²⁵

This distinction in use was also evident when the Commission decided that Pulver.com’s Free World Dialup (“FWD”) was an information service.²⁶ The Commission recognized that FWD and similar peer-to-peer services do not use LEC facilities in the same way as IP-to-PSTN or traditional voice services. FWD does not provide any “transmission” service. Moreover, because it requires a broadband connection at both ends, it technically does not contact the PSTN on either end of the call. Notably, FWD users cannot make calls to telephones on the PSTN.

IP-to-PSTN voice services are altogether different from services to which the ESP exemption legitimately has been applied. The Commission has never intended the ESP exemption to apply to IP-to-PSTN voice services. Indeed, it would be wholly inconsistent with the full history of the ESP exemption to stretch it to encompass such voice services. Interconnected VoIP services are purely substitutes for more traditional LEC services. Interconnected VoIP providers use the PSTN in the same way, and for the same purpose, as any network provider. For such traffic, the ESP exemption should not apply, and the Commission should remove confusion and opportunities for regulatory arbitrage by forbearing from any application of the ESP exemption to such traffic.

²⁵ *Id.* at 542. *See also id.* at 544 (noting the exemption applies to “ISPs that ... utilize the local networks differently” than carriers).

²⁶ *Petition for Declaratory Ruling that Pulver.com’s Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, Memorandum Opinion and Order, 19 FCC Rcd 3307 (2004).

3. Interconnected VoIP Is Functionally No Different Than More Traditional Voice Services Supported by the PSTN.

Interconnected VoIP service is functionally the same as traditional LEC voice service. The vast majority of such VoIP services today are indistinguishable to consumers from traditional telephone services. Whether the provider markets its services as “VoIP” – or as digital phone, Internet calling, or any other label – the service is intended and is understood as a substitute for traditional voice services provided by LECs.

It makes no difference whether an interconnected VoIP provider may offer other “integrated” services, such as call forwarding, networking, voice mail, or unified messaging. LECs offer or are developing many of the same features. Embarq, in particular, is an innovator in ILEC services.²⁷ The inherent nature of an IP-to-PSTN service is not altered simply because it is offered with additional features. The core functionality of interconnected VoIP service is the ability of a customer to have a real-time voice conversation with a customer of another service provider on the PSTN.

²⁷ Embarq is rolling out a range of innovative services and features that rivals anything offered by competitors, regardless of technology. They include: integrated voicemail for wireline and wireless services; integrated call forwarding, allowing transfer between wireless and wireline without interrupting the call; unified messaging that combines voicemail and electronic mail in a single inbox; SMS to landline, enabling Embarq wireless customers to send text messages to and from their landline devices; voice to screen services, converting voicemail messages to text, delivered to wireless phone or computer; integrated cordless landline and mobile wireless phonesets; broadband phones, combining the reliability of wireline voice service to convenient access to local directory and personalized information content; and Home and Small Office Hub services, unifying communications and applications in a centrally-located, “always on” device.

Indeed, when a LEC receives an IP-to-PSTN call, that call is no different than a call that originates on any traditional LEC-served telephone connected to the PSTN. It makes no difference whether or not an interconnected VoIP provider tracks the point where its IP-to-PSTN call originated. It makes no difference whether the IP-originated caller is fixed or nomadic. Fundamentally, interconnected VoIP is functionally no different from traditional LEC voice service.

Given that interconnected VoIP functionality is no different than traditional services, interconnected VoIP providers cannot fairly claim the ESP exemption entitles them to a regulatory advantage over competitors simply based on their choice of technology in originating a voice call. They “utilize LEC services and facilities in the same way [and] for the same purposes as other customers” subject to access charges.²⁸ Interconnected VoIP traffic imposes the same burden on the PSTN, and uses the same facilities, as more traditional telephone traffic. Consequently, companies sending IP-to-PSTN traffic to LECs should expect to contribute their full share to support the PSTN – support that is critical to maintain and extend the network deployment on which all traffic depends, especially for consumers in rural areas where broadband investment is most difficult to justify.

IP-to-PSTN calling accounts for a large and growing percentage of traffic on the PSTN. The Commission can use its forbearance authority to ensure the ESP exemption is not misapplied by competitors that would ultimately shortchange consumers by hampering investment in the PSTN.

²⁸ *Southwestern Bell Tel. Co.*, 153 F.3d at 542.

**B. Providers Are Over-Extending Claims to the ESP Exemption,
Which Is Creating too Many Disputes and Threatening
Needed Investment in Local Networks.**

It is widely known that IP-originated voice traffic has been growing dramatically. IP-telephony is rapidly becoming the standard in the enterprise market. In the mass market, cable-based voice service providers, which generally use IP technology in their networks, had 12.1 million residential customers as of June 2007, up 60% from the year before -- and up from 2.1 million in June 2002.²⁹ Cable-originated voice traffic will continue to rise sharply, as cable telephony services are now available to more than three quarters of all homes in America. Over-the-top VoIP services have grown rapidly, as well. Vonage alone reported 2.2 million subscribers at year-end 2006, up 75% from 2005.³⁰ Cable and other VoIP competitors together are gaining residential customers at a rate of 4 to 4.5 million annually; cable/VoIP telephony market share is expected to reach 25% by 2010.³¹ In addition, a growing percentage of long distance providers (especially in the prepaid card market) are using IP in their services.

²⁹ See National Cable & Telecoms. Ass'n, *Residential Telephony Customers 2001-2006*, available at <http://www.ncta.com/ContentView.aspx?contentId=61>.

³⁰ Press Release, *Vonage Holdings Corp. Reports Fourth Quarter and Full Year 2006 Results* at Table 2 (Feb. 15, 2007).

³¹ See M. Rollins & E. Schmitz, Citigroup Global Markets – Equity Research, *Teleconomy Update – Consumer Wireline Focus: Triple-Play Urgency Rising for Telcos as Share Erosion Continues* (Dec. 9, 2007) at 4, 7.

Today, most carriers delivering IP-to-PSTN voice traffic have been paying access charges.³² In fact, like many ILECs, Embarq has had signed interconnection agreements with many carriers that provide interconnected VoIP services, and they include commitments to pay access charges on that traffic. Increasingly, however, some carriers are disputing access charges (particularly intrastate charges) for what they claim are VoIP-originated calls, arguing that the ESP exemption may justify failing to pay access charges. Plainly, as VoIP-originated traffic has grown, access evasion and misapplication of the ESP exemption have become a serious problem and a growing risk for LECs and the PSTN. Like other LECs, Embarq is concerned about declines in critical access revenues throughout its local service territories – not just attributable to access line loss. Terminating access minutes of use appear to be falling more than access lines.

Reciprocal compensation arrangements are not a substitute for proper access treatment of non-local voice calls. In fact, beyond leading to shortfalls in access charge payments, misapplication of the ESP exemption even threatens to distort reciprocal compensation payments against ILECs. The Commission established a presumption that traffic that exceeds a three-to-one, originating-to-terminating ratio is ISP-bound and eligible for lower intercarrier compensation rates (e.g., \$0.0007/minute).³³ Consequently, when CLECs wrongly claim the ESP exemption and terminate non-local IP-originated

³² In recent years, major cable network operators, and the carriers that work with them, had consistently agreed to apply access charges to IP-to-PSTN calls delivered to Embarq. Similarly, Embarq believes that most enterprise VoIP traffic properly had been handled properly. With the growth in VoIP-originated calling, however, even formerly responsible carriers are now trying to misuse the ESP exemption.

³³ *Implementation of the Local Competition Provisions in the Telecoms. Act of 1996; Intercarrier Compensation for ISP Bound Traffic*, Order on Remand and Report and Order, 16 FCC Rcd 9151 (2001) (“*ISP Remand Order*”).

voice access traffic over local interconnection arrangements, they benefit from regulatory arbitrage. Mischaracterizing access traffic as originating local traffic also reduces the ratio of ILEC-originated minutes to CLEC-originated minutes. This triggers higher reciprocal compensation rates and thus inflates the reciprocal compensation payments owed by the ILEC to the interconnecting CLEC.³⁴

Inevitably, Embarq and other LECs have been involved in a growing number of disputes with other carriers about applicability and enforcement of access charges.³⁵ For Embarq and LECs nationwide, widespread access evasion is causing a decline in terminating access revenues. Self-serving over-extension of the ESP exemption by interconnected VoIP providers and their carriers is at the center of that problem.

C. The Commission Should Use its Forbearance Authority to Ensure the ESP Exemption Is Not Misapplied to the Detriment of Consumers and Competition.

In recent years, several disputes have been brought to the Commission about voice calls on the PSTN that were transmitted in IP at some prior point. For example, in 2002, AT&T Corp. sought a declaratory ruling that its self-styled “phone-to-phone IP telephony services” were within the ESP exemption.³⁶ In 2004, after unilaterally withholding access

³⁴ *Id.* at ¶ 79.

³⁵ In a recent dispute, for example, a carrier that provides interconnected VoIP services wrongly asserts that where voice calls are “VoIP transmissions rather than circuit-switched telephone calls, your company is not entitled to collect access charges on these calls.”

³⁶ *Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services Are Exempt from Access Charges*, WC Docket No. 02-361 (filed Oct. 18, 2002). The Commission denied the petition. *Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services Are Exempt from Access Charges*, Order, 19 FCC Rcd 7457 (2004).

charges, VarTec Telecom petitioned for a declaratory ruling that it had no duty to pay access charges on calls routed from “ESPs” or IP-based carriers.³⁷ In 2005, after a federal court deferred the issue to the Commission,³⁸ SBC filed a related petition seeking confirmation that the ESP exemption does not apply to traffic that merely transits an IP network somewhere in the call path.³⁹ In 2005, Frontier Telephone filed for a declaratory ruling that USA DataNet was obligated to pay originating access charges on Feature Group A services provided for the origination of interLATA voice calls.⁴⁰ Also in 2005, Grande Communications petitioned for a declaratory ruling seeking to confirm its view that interconnecting carriers may simply “self-certify” whether the traffic they carry is subject to access charges, assuming (wrongly) that IP-originated voice telephony is subject to the ESP exemption.⁴¹

³⁷ *Petition for Declaratory Ruling that VarTec Telecom, Inc. Is Not Required to Pay Access Charges to Southwestern Bell Telephone Company or Other Terminating Local Exchange Carriers When Enhanced Service Providers or Other Carriers Deliver the Calls to Southwestern Bell Telephone Company or Other Local Exchange Carriers for Termination*, WC Docket No. 05-276 (filed Aug. 20, 2004); *withdrawal granted by Order*, 22 FCC Rcd 5603 (Mar. 29, 2007).

³⁸ The court dismissed without prejudice SBC’s claims for access charges due on long distance calls transported using IP technology. *Southwestern Bell Tel. v. VarTec Telecom, Inc.*, No. 4:04-CV-1303, 2005 U.S. Dist. Lexis 26166 (E.D. Mo. Aug. 23, 2005). The defendants included VarTec, UniPoint Enhanced Services, Inc. (d/b/a PointOne), UniPoint Services, Inc., UniPoint Holdings, Inc., Transcom Communications, Inc., and Transcom Holdings, LLC.

³⁹ *Petition of the SBC ILECs for a Declaratory Ruling That UniPoint Enhanced Services, Inc. d/b/a PointOne and Other Wholesale Transmission Providers Are Liable for Access Charges*, WC Docket No. 05-276 (filed Sept. 21, 2005).

⁴⁰ *Petition for Declaratory Ruling that USA DataNet Corp. is Liable for Originating Access Charges when it Uses Feature Group A Dialing to Originate Long Distance Calls*, WC Docket No. 05-276 (filed Nov. 23, 2005; withdrawal granted Mar. 28, 2007).

⁴¹ *Petition for Declaratory Ruling Regarding Self-Certification of IP-Originated Traffic*, WC Docket No. 05-283 (filed Oct. 3, 2005).

The Commission has also received forbearance petitions seeking to expand the ESP exemption. In 2003, Level 3 Communications asked the Commission to “forbear from enforcing its governing statute and rules to the extent that they could be interpreted to permit [LECs] to impose interstate or intrastate access charges on [IP-to-PSTN] traffic.”⁴² Level 3 withdrew the petition when it became clear it would be denied, and the Commission lost an opportunity to affirm that the ESP exemption does not apply to IP-to-PSTN voice calls.

More recently, Feature Group IP filed essentially the same request as Level 3.⁴³ Citing its long-running state arbitration dispute with AT&T in Texas, Feature Group IP asked the Commission to forbear from enforcing access charges on IP-to-PSTN voice traffic, plus “incidental” PSTN-to-PSTN traffic (which may or may not have been converted to “IP-in-the-middle” traffic). It cites to what it calls “current legal uncertainty” over the applicability of access charges to IP-to-PSTN traffic. The Act and the Commission’s rules, Feature Group IP contends, “make[] clear that [IP-to-PSTN] traffic is *not* to be subjected to access charges.”⁴⁴

Needless to say, Embarq absolutely disagrees with Feature Group IP’s legal and policy arguments. Clearly, such false assumptions about the ESP exemption are a real and

⁴² *Level 3 Communications LLC’s Petition for Forbearance Under 47 U.S.C. § 160(c) and Section 1.53 of the Commission’s Rules from Enforcement of Section 251(g), Rule 51.701(b)(1), and Rule 69.5(b)*, WC Docket No. 03-266 (filed Dec. 23, 2003).

⁴³ *Feature Group IP Petition for Forbearance Pursuant to 47 U.S.C. § 160(c) from Enforcement of 47 U.S.C. § 251(g), Rule 51.701(a)(1), and Rule 69.5(b)*, WC Docket No. 07-256 (filed Oct. 23, 2007) (“*Feature Group IP Petition*”). Public Notice, DA No. 07-5029 (rel. Dec. 18, 2007).

⁴⁴ *Id.* at iv (emphasis in original).

growing problem. The disputes that have prompted these and other filings underscore the need to grant Embarq's petition.

D. Limited Forbearance Should Extend to Commission Orders Creating and Acknowledging the ESP Exemption, to 47 C.F.R. § 69.5(a), and to 47 U.S.C. § 251(b)(5).

Forbearance here involves three parts. The Commission should (1) forbear from enforcing the ESP exemption, as adopted by Commission orders, and (2) section 69.5(a) of its rules to IP-originated voice traffic that terminates to the PSTN. Finally, the Commission should (3) forbear from enforcing 47 U.S.C. section 251(b)(5) to provision to non-local traffic terminated as voice traffic on the PSTN.

The ESP exemption is not codified. It is a creation of Commission policy, adopted, continued, and acknowledged in Commission orders. Accordingly, the Commission should expressly forbear from the 1983 *Access Charge Order*, the 1988 *ESP Order*, the 1997 *Access Charge Reform Order*,⁴⁵ and any subsequent orders that acknowledge or apply the exemption, to the extent language in those orders might be interpreted to justify applying the ESP exemption to IP-to-PSTN voice traffic.

Section 69.5(a) of the Commission's rules creates a separate class of access charges for "end users," as distinct from carriers governed by section 69.5(b). The Commission should forbear from allowing any application or enforcement of section 69.5(a) where any service provider might claim that IP-to-PSTN traffic qualifies it for treatment as an end user, rather than paying appropriate access charges under section 69.5(b).

⁴⁵ *Access Charge Reform Order*, 12 FCC Rcd 15982 at ¶ 345.

Section 251(b)(5) establishes carriers' duty to establish reciprocal compensation arrangements. The Commission should forbear from application or enforcement of section 251(b)(5) where any service provider might claim its non-local IP-to-PSTN traffic is subject to reciprocal compensation.

III. FORBEARANCE STANDARDS ARE MET.

Section 10 of the Act provides:⁴⁶

[T]he Commission shall forbear from applying any regulation or any provision of the Act ... if the Commission determines that (1) enforcement ... is not necessary to ensure that the charges ... are just and reasonable and are not unjustly or unreasonably discriminatory; (2) enforcement ... is not necessary for the protection of consumers; and (3) forbearance ... is consistent with the public interest.

When the three statutory elements of section 10 are satisfied, the Act requires the Commission to forbear from applying or enforcing the regulation. Embarq's petition readily meets those standards.

A. The ESP Exemption Is Not Necessary to Ensure Just and Reasonable and Nondiscriminatory Charges.

The ESP exemption is not necessary to ensure that imposition of terminating access charges "are just and reasonable and are not unjustly or unreasonably discriminatory."⁴⁷ First, the Commission itself created the current access charge regime. It concluded that the access charge system is fair and reasonable. The system includes a limited exemption for ESPs, but it was never extended to IP-to-PSTN voice calls. The

⁴⁶ 47 U.S.C. § 160(a).

⁴⁷ 47 U.S.C. § 160(a)(1).

Commission has always intended that “cost of the PSTN should be borne equitably among those that use it in similar ways.”⁴⁸ It would be unjust and unreasonable, and most certainly discriminatory, if IP-originated voice traffic did not contribute the same per-minute support to the PSTN that traditional voice services do. This is particularly true given that they compete directly against one another. Granting Embarq’s petition would reinforce a system the Commission found just and reasonable. It would not subject any providers to unjust or unreasonable, or discriminatory charges.

Second, the Commission determined appropriate access charges. In the *CALLS Order*, it concluded that those charges were “just and reasonable.” It cited the “long-standing policy to require, to the extent possible, rate structures to reflect the manner in which carriers incur cost.”⁴⁹ The *CALLS* plan, it concluded, “reduces, and in most instances eliminates implicit subsidies among end-user classes; makes implicit universal service funding in access charges explicit and portable, [and] provides significant benefits to consumers who make few or no long distance calls.”⁵⁰ It found that today’s access charge system “is a reasonable approach for moving toward the Commission’s goals of using competition to bring about cost-based rates, and removing implicit subsidies without jeopardizing universal service.”⁵¹ Granting Embarq’s request for forbearance, therefore, would simply restore compliance with the long-standing, reasonable

⁴⁸ *IP Enabled Services NPRM* at ¶ 61 (emphasis added).

⁴⁹ *CALLS Order*, 15 FCC Rcd 12962 at ¶ 129.

⁵⁰ *Id.* at ¶ 29.

⁵¹ *Id.* at ¶ 129.

intercarrier compensation system, at least until such time as the Commission completes comprehensive intercarrier compensation and universal service reform.

Third, over-extension of the ESP exemption under-compensates ILECs for use of the PSTN by overstating traffic subject to reciprocal compensation. Non-local IP-to-PSTN voice traffic is increasingly being routed over local interconnection trunks to avoid terminating access. As a result of this regulatory arbitrage, ILECs are improperly denied access revenues for terminating competitors' non-local voice calls. At the same time, ILECs that opted into the *ISP Remand Order*,⁵² like Embarq, are forced to over-pay reciprocal compensation to those same competitors, because the arbitrage inflates ILEC-originated minutes below the three-to-one ratio presumed for ISP-bound traffic. Granting Embarq's petition would minimize this abuse, end this discriminatory treatment toward IP-originating voice traffic, and improve compliance with just and reasonable rates and terms necessary to support the PSTN.

Finally, forbearance actually will promote just and reasonable and nondiscriminatory charges, because regulatory arbitrage discriminates against customers of non-IP based providers. Forbearance would reduce the unfair discrimination currently directed toward carriers with non-IP originated voice calls. "[O]ne of the FCC's primary goals when designing an access charge regime was to ensure that access users were treated in a nondiscriminatory manner when interconnecting with LEC networks in order to transport interstate communications."⁵³ It is unreasonable to discriminate against

⁵² *ISP Remand Order*, 16 FCC Rcd 9151 at ¶¶ 8, 79.

⁵³ *Id.* at ¶ 36 n.63, citing *NARUC v. FCC*, 737 F.2d 1095, 1101-1108, 1130-43 (D.C. Cir. 1984).

traditional carriers, by making them contribute terminating access charges on non-local traffic, when interconnected VoIP providers claim exemption for their non-local calls terminated on the PSTN. Forbearance would reduce discrimination, by reiterating that all service providers are subject to the same rules.

B. The ESP Exemption Is Not Necessary to Protect Consumers.

Misapplying the ESP exemption to IP-to-PSTN traffic certainly is not necessary to protect consumers.⁵⁴ Allowing IP-to-PSTN voice calls to evade access charges might benefit, at best, a fraction of consumers – those who might enjoy artificially low retail rates for their interconnected VoIP services thanks to what is effectively regulatory arbitrage. Ultimately, their benefit is possible only by forcing other carriers and their consumers to subsidize VoIP calls terminating on the PSTN, a situation that the Commission has never suggested it intended and which would be arbitrary and unreasonable given the competitive environment and declining ILEC access lines.

Embarq recognizes that intercarrier compensation reform is needed. For that reason, Embarq is part of the Missoula reform coalition.⁵⁵ Intercarrier reform, however, must proceed holistically and comprehensively. Extending the ESP exemption to IP-to-PSTN voice calls, as some VoIP service providers and carriers seek to do, is a self-evidently piecemeal approach, and one the Commission never intended in the first place. It would be wholly unreasonable –

⁵⁴ 47 U.S.C. § 160(a)(2).

⁵⁵ See *Missoula Intercarrier Compensation Reform Plan*, attached to Letter from Tony Clark, Commissioner and Chair, NARUC Committee on Telecommunications, Ray Baum, Commissioner and Chair, NARUC Task Force, and Larry Landis, Commissioner and Vice-Chair, NARUC Task Force to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-92 (filed Jul. 24, 2006).

indeed, arbitrary and capricious – to alter one component (access charges for IP-originated calls) of an inextricably interrelated web of intercarrier compensation and universal service funding issues.

Ultimately, consumers would be harmed if forbearance is not granted and carriers continue to stretch the ESP exemption to IP-to-PSTN calls. Until the Commission completes and implements comprehensive intercarrier compensation and universal service reform, access charges remain necessary so that ILECs can operate and maintain their carrier-of-last-resort networks – networks over which *all* applications flow. With the decline in access revenues caused by over-extension of the ESP exemption, inevitably ILECs will be compelled to raise their charges, where possible, to recover those lost revenues. Price caps⁵⁶ limit Embarq's ability to recover those lost access revenues from other customers, but ILECs necessarily will have to shift these legitimate costs to carriers that do pay terminating access and to customers of other services. That harms most consumers and undermines investment in the PSTN.

Indeed, the impact of such IP-to-PSTN access avoidance would be most acute in high cost, rural areas, where the costs of maintaining and upgrading the network are highest and where ILECs are most dependent on access charge revenues to compensate for carrier-of-last-resort mandates.⁵⁷ To the extent rural carriers do not recover these lost revenues, the burden on the universal service high cost fund may have to increase – which increases the burden on all consumers. Further, any access evasion based on interconnected VoIP's supposed eligibility

⁵⁶ *Policy and Rules Concerning Rates for Dominant Carriers*, Second Report and Order, 5 FCC Rcd. 6786 (1990); *Policy and Rules Concerning Rates for Dominant Carriers*, Order on Reconsideration, 6 FCC Rcd. 2637 (1991).

⁵⁷ Some service providers had used the same rationale to justify failure to contribute to universal service, which undermined the viability of the fund. The Commission resolved that issue by extending support obligations to Internet service providers.

for the ESP exemption forces LECs to reduce investment in their networks, frustrating deployment of advanced services and to the particular detriment of rural consumers.⁵⁸

Granting forbearance would avoid all these consumer harms. It will help ensure IP-enabled voice calls contribute their fair share of the cost of the PSTN, for the benefit of all the nation's consumers.

C. Forbearance from the ESP Exemption on IP-to-PSTN Voice Traffic Is in the Public Interest.

Forbearance from any application of the ESP exemption to IP-to-PSTN voice traffic is in the public interest. It would promote and enhance competition by ensuring a level playing field among service providers. It would reduce regulatory arbitrage and disputes. It would help maintain investment in the PSTN, especially in rural areas, by helping ensure that some providers cannot free-ride on the PSTN and leave LECs undercompensated for use of their networks.

1. Forbearance Would Promote and Enhance Competition.

Section 10 provides that the Commission, in making its public interest review, "shall consider whether forbearance ... will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services...."⁵⁹

⁵⁸ It would be ironic if over-extension of the ESP exemption by some VoIP providers were allowed to prevent the high speed data deployment in rural areas. Rural consumers lacking access to broadband services would be obliged to subsidize VoIP providers and consumers.

⁵⁹ 47 U.S.C. § 160(b).

The public interest, the Commission has found, requires “competitively neutral” rules.⁶⁰ This was true when the Commission mandated equal support for universal service, and for disability support, and for E911 capabilities. The same is true for support of the PSTN through uniform application of access charges. “VoIP services increasingly substitute for traditional phone service,” and “much of the appeal of [interconnected VoIP] services to consumers derives from the ability to place calls to and receive calls from the PSTN.”⁶¹ Interconnected VoIP providers, “like telecommunications carriers, have built their business, or a part of their business, on access to the PSTN,”⁶² and they “are dependent on the widespread telecommunications network for the maintenance and expansion of their business” and “directly benefit[] from a larger and larger network.”⁶³

It is essential that “disparities are minimized so that no entity receives an unfair competitive advantage that may skew the marketplace or inhibit competition by limiting the

⁶⁰ In the context of universal service support, the Commission has said competitive neutrality means “neither unfairly advantag[ing] nor disadvantag[ing] particular service providers or ... technologies” in the application of Commission rules. *Federal-State Joint Bd. on Universal Service*, Report and Order, 12 FCC Rcd 8776 at ¶ 47 (1997), *Errata*, FCC 97-157 (rel. June 4, 1997), *aff’d in part, rev’d in part and remanded in part sub nom. Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393 (5th Cir. 1999), *cert. denied*, 530 U.S. 1210 (2000), *cert. dismissed*, 531 U.S. 975 (2000) (“*Federal-State Joint Bd. Order*”).

⁶¹ *Universal Service Contribution Methodology*, Report and Order and Notice of Proposed Rulemaking, 21 FCC Rcd 7518 at ¶ 43 (2006), *aff’d in rel. part, Vonage Holdings Corp. v. FCC*, 487 F.3d 1232 (D.C. Cir. 2007) (“*USF Contribution Order*”). See also *IP-Enabled Services*, First Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 10245 at ¶ 23 (2005) (“*VoIP 911 Order*”) (emphasizing that consumers expect interconnected VoIP services to work much “like a ‘regular telephone’”).

⁶² *USF Contribution Order*, 21 FCC Rcd 7518 at ¶¶ 43, 35.

⁶³ *Texas Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393, 428 (5th Cir. 1999), *cert. denied*, 530 U.S. 1210 (2000), *cert. dismissed*, 531 U.S. 975 (2000).

available quantity of services or restricting the entry of potential service providers.”⁶⁴

Forbearing from any application of the ESP exemption to IP-to-PSTN voice traffic will also ensure the marketplace is not skewed in favor of one type of service technology. With some competitors misinterpreting the ESP exemption, failing to forbear would only undermine “the technology-neutral goals of the Act” and frustrate “Congress’ aim to encourage competition.”⁶⁵

Over-extending the ESP exemption would confer an arbitrary and grossly unreasonable competitive advantage upon one class of service provider over others, simply based on the technology used in originating the call. The ESP exemption was adopted and retained, because ESPs used the PSTN differently than carriers – to connect to their own information service subscribers – and warranted exemption to encourage the early growth of the ESP industry. It did not give, and was never intended to extend, any particular provider an artificial regulatory advantage over any other provider. In contrast, extending the exemption to VoIP providers (and their associated carriers) would confer a wholly artificial regulatory advantage to one class of providers over another class competing within the exact same market: voice telephone services. It would be senseless to allow the ESP exemption to be converted, for the first time, into a source of gross competitive inequality.

Forbearance would advance competition by helping ensure more uniform application of, and adherence to, access charge rules among all service providers. It would ensure that access charge rules are not tilted in favor of VoIP providers against other competitors, when

⁶⁴ *Federal-State Joint Bd. Order*, 12 FCC Rcd 8776 at ¶¶ 48, 49.

⁶⁵ *Deployment of Wireline Servs. with Advanced Telecoms. Capability*, Order on Remand, 15 FCC Rcd 385 at ¶ 12 (2000).

they are all using the PSTN in the very same way. The Commission should take this opportunity to eliminate the competitive distortions and technology bias caused by over-extension of the ESP exemption.

2. Forbearance Would Reduce Regulatory Arbitrage and Disputes.

For some time, there has been debate about the classification of VoIP as information services.⁶⁶ The Commission does not need to address that issue here. Embarq's petition addresses a different and far narrower issue: ensuring the ESP exemption is not misapplied to IP-to-PSTN voice calls.

The whole point of the Intercarrier Compensation proceeding, the Commission has explained, has been "to move toward a unified compensation regime that eliminates the opportunity for arbitrage due to different regulatory treatment of different types of traffic."⁶⁷ Access charge evasion is one of the specific forms of regulatory arbitrage that the Commission continually has tried to discourage in its access charge regime.⁶⁸ For Embarq, it

⁶⁶ The Commission has already taken some important steps to resolve important issues governing classification of VoIP as information services, generally with a view toward reducing the disparity in social regulations between VoIP and traditional services. Granting this Petition would be consistent with that trend. *See VoIP 911 Order*, 20 FCC Rcd 10245 (applying E911 requirements to interconnected VoIP services); *Communications Assistance to Law Enforcement Act and Broadband Access and Services*, First Report and Order and Further Notice of Proposed Rulemaking, 20 FCC Rcd 14989 (2006), *aff'd*, *American Council on Educ. v. FCC*, 451 F.3d 226 (D.C. Cir. 2006) (applying CALEA compliance requirements); *USF Contribution Order*, 21 FCC Rcd 7518 (applying universal service support obligations).

⁶⁷ *Declaratory Ruling, Petitions of Sprint PCS and AT&T Corp. for Declaratory Ruling Regarding CMRS Access Charges*, Declaratory Ruling, 17 FCC Rcd 13192 at ¶ 20 (2002), *pet. for rev. dismissed*, *AT&T Corp. v. FCC*, 349 F.3d 692 (D.C. 2003).

⁶⁸ The Commission described examples of access charge avoidance as regulatory arbitrage in its most recent NPRM on Intercarrier Compensation. *See Developing a*

is one of the fastest growing sources of disputes. This IP-to-PSTN access arbitrage has frustrating and damaging consequences. It is not simply that ILECs are forced to divert resources to try to identify terminating traffic that does not qualify for the ESP exemption, or that they may recover only a fraction of the charges actually owed them, even in negotiating interconnection agreements, ILECs are facing battles over the classification of traffic and the appropriate intercarrier compensation for such traffic.

Forbearance would reduce these traffic classification disputes. It would eliminate any presumed regulatory uncertainty about access charges on IP-to-PSTN voice calls. It would minimize disputes, avoid needless lawsuits, complaints, and interconnection battles. It would spare federal and state authorities – and the Commission – the need to hear the growing number of disputes between LECs and carriers of IP-based voice traffic.

Forbearing from the ESP exemption will reduce the growing regulatory arbitrage that drives these disputes. In the past, the Commission has taken steps to end regulatory arbitrage.⁶⁹ It has issued rulings confirming that IP-in-the-middle is not within the ESP exemption,⁷⁰ and that advertisements inserted into prepaid card announcements do not render calling card voice traffic “enhanced services” for purposes of universal service

Unified Intercarrier Compensation Regime, Notice of Proposed Rulemaking, 16 FCC Rcd 9610 at ¶ 12 (2001).

⁶⁹ *Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, Seventh Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 9923 at ¶ 3 (2001) (“*CLEC Access Charge Reform Order*”).

⁷⁰ *Petition for Declaratory Ruling that AT&T’s Phone-to-Phone IP Telephony Services Are Exempt from Access Charges*, Order, 19 FCC Rcd 7457 (2004).

contributions.⁷¹ It acted to end regulatory arbitrage in CLEC access rates.⁷² It adopted the “parent trap” rule to discourage carriers from transferring exchanges simply to increase high-cost universal service support.⁷³ The Commission should use forbearance here to continue its stated policy of reducing regulatory arbitrage.

3. Forbearance Would Protect Investment in the PSTN, Particularly in Rural America.

In section 706 of the Act, Congress instructed the Commission to use all means at its disposal, “including regulatory forbearance,” “to remove barriers to infrastructure investment” and to “encourage the deployment on a reasonable and timely basis of advanced telecommunications capability.”⁷⁴ Embarq’s forbearance petition is an opportunity for the Commission to advance these goals by protecting investment in the PSTN.

The access charge regime was designed to ensure that all companies using the PSTN contribute toward its costs. ILECs are unique, in that they provide the local backbone on which most traffic depends. Even as they lose revenues and market share to competitors (including cable telephony and interconnected VoIP providers), ILECs continue to have carrier-of-last-resort obligations requiring them to maintain and expand

⁷¹ *AT&T Corp. Pet. for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Servs.*, Order and Notice of Proposed Rulemaking, 20 FCC Rcd. 4826 (2005) (noting also that intrastate access charges apply notwithstanding routing to an out-of-state platform), *pet. for rev. denied*, *AT&T Co. v. FCC*, 454 F.3d 329 (D.C. Cir. 2006).

⁷² *CLEC Access Charge Reform Order*, 16 FCC Rcd 9923.

⁷³ *Federal-State Joint Bd. Order*, 12 FCC Rcd at 8942-43.

⁷⁴ 47 U.S.C. § 157 nt.

a network capable of serving virtually any customer. IP-to-PSTN access arbitrage denies ILECs revenue that they need to maintain and upgrade their networks.⁷⁵

Forbearing from the ESP exemption, to the extent it may be claimed to apply to IP-to-PSTN voice traffic, will help protect investment in the PSTN. Ending the artificial access revenue shortfall will free up capital that ILECs could otherwise invest in extending broadband services to low density, rural areas currently under-served or unserved by any broadband provider. Allowing this regulatory arbitrage to continue, and to continue growing, will only contribute to leaving network investment in rural America farther and farther behind.

IV. CONCLUSION

The ESP exemption was meant to be a narrow exception to the obligation of all service providers to contribute an equal share toward the costs of the PSTN. The ESP exemption has never properly applied to IP-to-PSTN voice traffic. The transition of service providers (including Embarq) to IP-based technologies was never meant to bypass the nation's intercarrier compensation system or undermine the PSTN. By exercising its forbearance authority here – by forbearing from any application or enforcement of the ESP exemption for IP-to-PSTN voice traffic – the Commission will help ensure IP-originated calls contribute their fair share of support for the PSTN, and help promote investment in advanced telecommunications capability in rural areas where it otherwise will be increasingly difficult to justify. It will provide a greater measure of

⁷⁵ Because price cap ILECs' ability to raise access rates is constrained, they are unable to fully recover this lost access revenue. Realistically, however, even rate of return ILECs are unable to recover.

stability and certainty for everyone, minimize regulatory arbitrage, and reduce disputes. It will prevent carriers from misapplying the ESP exemption to voice calls – a type of traffic it has never properly applied to. It will promote fair competition between interconnected VoIP and traditional voice services when they use the PSTN in the very same way.

Respectfully submitted,

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APPENDIX A

EMBARQ LOCAL OPERATING COMPANIES
Subsidiaries of Embarq Corporation

Central Telephone Company d/b/a Embarq
Central Telephone Company of Texas, Inc. d.b.a Embarq
Central Telephone Company of Virginia d/b/a Embarq
Embarq Florida, Inc.
United Telephone Company of Indiana, Inc. d/b/a Embarq
United Telephone Company of Eastern Kansas d/b/a Embarq
United Telephone Company of Kansas d/b/a Embarq
United Telephone Company of Southcentral Kansas d/b/a Embarq
Embarq Minnesota, Inc.
Embarq Missouri, Inc.
Carolina Telephone and Telegraph Company d/b/a Embarq
United Telephone Company of the West d/b/a Embarq
United Telephone Company of New Jersey, Inc. d/b/a Embarq
United Telephone Company of Ohio d/b/a Embarq
United Telephone Company of the Northwest d/b/a Embarq
United Telephone Company of Pennsylvania d/b/a Embarq
United Telephone Company of the Carolinas d/b/a Embarq
United Telephone-Southeast, Inc. d/b/a Embarq
United Telephone Company of Texas, Inc. d/b/a Embarq